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(18,826.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 211.

NORTHERN PACIFIC RAILWAY COMPANY

vs.

ALLINE A. DIXON, ADMINISTRATRIX OF THE ESTATE OF CHAUNCEY A. DIXON, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 10, 1903.

1 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* ALLINE A. DIXON, Administratrix of the Estate of Chauncey A. Dixon, Deceased, Defendant in Error.	In Error to the Circuit Court of the United States for the District of Minnesota.

The United States circuit court of appeals for the eighth circuit sitting at the city of St. Louis, Missouri, on the 22nd day of January, A. D. 1903, certifies that the record on file in the action above entitled, which is pending in this court upon a writ of error duly issued to review a judgment rendered in said action in favor of the defendant in error in the United States circuit court for the district of Minnesota discloses the following facts:

The defendant in error as administratrix of the estate of Chauncey A. Dixon brought this action in the court below, as she was authorized to do by the statutes of the State of Montana, to recover damages for the death of her son, Chauncey A. Dixon. She alleged in her complaint the necessary facts to give the court jurisdiction, that her son Chauncey was killed in the State of Montana on December 25, 1899, while he was employed by the plaintiff in error, and was engaged, as a fireman in operating extra freight train No. 162, by means of a head-end collision of that train with extra freight train No. 159, which was brought about by the negligence of the plaintiff in error. The railway company in its answer admitted the jurisdictional facts, the employment, the collision and the death, but denied that it was guilty of negligence and alleged that the death was caused by the negligence of a local telegraph operator and station agent who was the fellow servant of the deceased fireman. The parties to the action waived a jury, made an agreed statement of facts and sub-
2 mitted the case to the court for decision. These were the facts: The railway company was operating its railroad in Montana. It had made and promulgated time tables for its regular trains and had adopted reasonable rules for the operation of all its trains. The time tables did not, and could not provide for the running of extra trains. The railway company had in its employment a train dispatcher at Missoula, in the State of Montana, who had general power and sole authority to make and promulgate orders for the running of those trains on the division of its railroad on which this collision occurred which were not governed by the time tables. A large proportion of its freight trains on this division were run as extra trains and the times of their arrivals and departures were not shown on the regular time tables, but their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to the train dispatcher by its station agents and operators along the line of the railroad. All these facts were well known to the plaintiff's intestate, Chauncey A. Dixon.

One of the rules of the company was: "Operators will promptly record in a book to be kept for the purpose and report to the superintendent, the time of arrival and departure of all trains and the direction in which extra trains are moving." The reports mentioned in this rule were made to the train dispatcher and he was vested with the authority of the superintendent to issue orders for the movement of trains.

On the evening of December 24, 1899, extra freight train No. 162 on which Dixon was fireman was running east and extra freight train No. 159 was running west on the railroad of plaintiff in error. They were running on special schedules not included in the time tables and under the telegraphic orders of the train dispatcher at Missoula in accordance with the rules of the company. No. 162 left Missoula going east at 10.20 p. m. on December 24, 1899. Its destination was Helena, Montana. Bonita is a station 26 miles east of Missoula, Carlan a station 33 miles east of Missoula, Drummond a station 53 miles east of Missoula and Garrison is a station 74 miles east of Missoula. No. 159 was east of Garrison under orders
3 to run west to Garrison. The only telegraph offices open during the night between Missoula and Garrison were those at Bonita and Drummond. It was the duty of the telegraph operator and station agent at Bonita to observe the movement of trains passing his station during the night and to advise the train dispatcher at Missoula of their movements. Extra freight train No. 162 arrived at Bonita at 12.35 a. m. on December 25, 1899, and left there at 12.50 a. m. on that day, but the local operator and station agent was asleep and did not know of, or report its passage and none of the crew on that train were aware of the fact that extra No. 159 was coming west. The railroad had but one track. At 1.05 a. m. No. 159 reached Garrison and that fact was reported to the train dispatcher. Thereupon he asked the telegraph operator and station agent at Bonita by telegraph whether or not extra freight No. 162 had arrived there and he promptly answered that it had not. The train dispatcher then ordered the train crew of No. 159 to run extra from Garrison to Missoula and to meet No. 162 at Carlan, and this order was duly received by that crew at Garrison. At the same time he ordered the crew of No. 162 to meet No. 159 at Carlan and sent this order to the operator and station agent at Bonita to deliver to them. At the same time he ordered a red signal displayed at Drummond to stop No. 159 there so that the meeting point could be changed on its arrival there if necessary. These orders were complete at 1.18 a. m. At 1.20 a. m. No. 159 left Garrison and it arrived at Drummond at 1.57 a. m. and the train dispatcher was immediately informed of this fact. He then inquired of the operator and station agent at Bonita whether or not extra freight No. 162 had arrived at Bonita yet and the latter promptly replied "No sign of them yet." He then asked him if he was sure No. 162 had not passed and he replied yes. The train dispatcher then repeated his inquiry and the operater and station agent at Bonita answered "Yes, I am sure extra 162 has not passed." Thereupon the train dispatcher issued an

order to the crew of No. 159 to meet No. 162 at Bonita and an order to the crew of No. 162 to meet No. 159 at Bonita and sent the former order to Drummond and the latter to Bonita. The crew of No. 159 received their order and proceeded with their train. It col-
4 lided with No. 162 and the intestate Dixon was killed by the collision about four miles west of Drummond at 2.15 a. m. The damages sustained by the defendant in error by his death were $3500. Upon this state of facts the circuit court rendered a judgment for the defendant in error and the plaintiff in error sued out a writ of error to reverse it.

And the said circuit court of appeals for the eighth circuit further certifies that the following questions of law among others are presented by the assignment of errors in this case, that their decision is indispensable to a decision of this case and that to the end that this court may properly decide the issues of law presented it desires the instruction of the Supreme Court of the United States upon the following questions and propositions of law, to wit:

First. When a local telegraph operator is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator?

Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train dispatcher, the negligence of a vice-principal for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman the risk of which the latter assumes?

5 In witness whereof, the undersigned judges holding the said United States circuit court of appeals for the eighth circuit, have hereunto set their hands this twenty-second day of January, A. D. 1903, at St. Louis, Missouri, and ordered that the foregoing certificate be filed in said circuit court of appeals and by the clerk of said court duly forwarded to the Supreme Court of the United States.

HENRY C. CALDWELL,
WALTER H. SANBORN,
AMOS M. THAYER,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

6 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing certificate in the case of Northern Pacific Railway Company, plaintiff in error, *vs.* Alline A. Dixon, administratrix of the estate of Chauncey A. Dixon, deceased, defendant in error, No. 1775, December term, A. D. 1902, was duly filed and entered of record in my office by order of said circuit court of appeals and as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this 22nd day of January, A. D. 1903.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals
for the Eighth Circuit.

[Endorsed:] U. S. circuit court of appeals, eighth circuit. December term, 1902. No. 1775. Northern Pacific Railway Company, plaintiff in error, *vs.* Alline A. Dixon, adm'x, &c. Certificate of questions to the Supreme Court of the United States. Filed Jan. 22, 1903. John D. Jordan, clerk.

Endorsed on cover: (Certificate.) File No. 18,826. U. S. circuit court of appeals, eighth circuit. Term No. 211. Northern Pacific Railway Company *vs.* Alline A. Dixon, administratrix of the estate of Chauncey A. Dixon, deceased. Filed February 6, 1903.

FILE COPY

Supreme Court of the United States.

OCTOBER TERM, [illegible]

No. 211.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

ALAINE A. DIXON, *Administratrix of the Estate of* CHAUMONT A. DIXON, *Deceased.*

CERTIFICATE FROM THE SUPREME COURT OF APPEALS OF THE STATE OF [illegible].

BRIEF FOR NORTHERN PACIFIC RAILWAY COMPANY.

C. W. BUNN,
[illegible] HARDY,
JAMES B. KERR,
Counsel for Northern Pacific Railway Company.

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 211.

NORTHERN PACIFIC RAILWAY COMPANY,

vs.

ALLINE A. DIXON, *Administratrix of the Estate of* CHAUNCEY A. DIXON, *Deceased.*

STATEMENT.

This action was brought in the Circuit Court of the United States for Minnesota by Alline A. Dixon, as Administratrix, to recover damages for the death of Chauncey A. Dixon. She recovered a judgment for $3,500.00, which was taken by writ of error to the Circuit Court of Appeals for the Eighth Circuit, where two questions were certified to this Court.

> *First.* When a local telegraph operator is called upon specially by a train despatcher to give information relative to the arrival of a train at his station, to enable the despatcher

to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the despatcher that was induced by false information given by the local operator?

Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train despatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train despatcher, the negligence of a vice principal for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman the risk of which the latter assumes?

The certificate of the court gives a brief statement of the facts substantially as follows:

The Railway Company was operating its railroad in Montana and had made and promulgated time tables for its regular trains and had adopted reasonable rules for the operation of all its trains. The time tables did not and could not provide for the running of extra trains. The Railway Company had in its employ a train despatcher at Missoula, Montana, who had general power and sole authority to make and promulgate orders for the running of those trains, which were not covered by the time tables. A large proportion of the freight trains were run as extra trains and the times of their arrivals and departures were not shown on the regular time

tables. Their movements were made upon telegraphic orders issued by the train despatcher upon information furnished by telegraph to the despatcher by station agents and operators along the line of the railroad. All these facts were well known to the deceased.

One of the rules of the company was:

> "Operators will promptly record in a book to be kept for the purpose and report to the superintendent, the time of arrival and departure of all trains and the direction in which extra trains are moving."

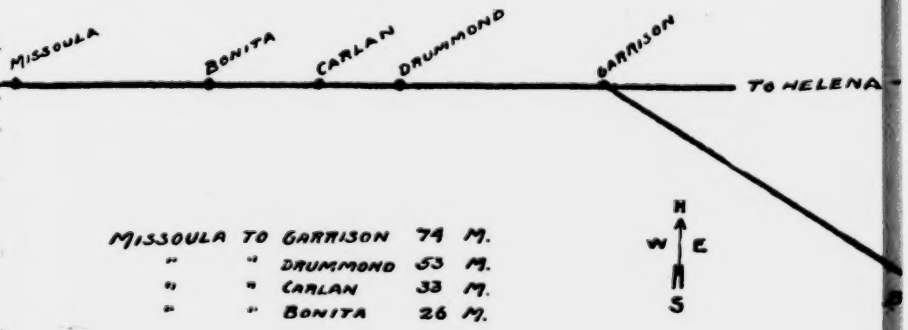
The reports mentioned in this rule were made to the train despatcher and he was vested with the authority of the superintendent to issue orders for the movement of trains.

On the evening of December 24, 1899, extra freight train No. 162 on which Dixon was fireman was running east and extra freight train No. 159 was running west on the railroad of plaintiff in error. Both were running on special schedules not included in the time tables and under the telegraphic orders of the train despatcher at Missoula in accordance with the rules of the company. No. 162 left Missoula going east at 10:20 p. m. Its destination was Helena, Montana. Bonita is a station 26 miles east of Missoula; Carlan a station 33 miles east of Missoula; Drummond a station 53 miles east of Missoula, and Garrison is a station 74 miles east of Missoula. No. 159 was east of Garrison under orders to run west to Garrison. The only telegraph offices open during the night between Missoula and Garri-

son were those at Bonita and Drummond. It was the duty of the telegraph operator and station agent at Bonita to observe the movement of trains passing his station during the night and to advise the train despatcher at Missoula of their movements. Extra freight train No. 162 arrived at Bonita at 12:35 a. m., and left there at 12:50 a. m. on December 25, but the local operator and station agent was asleep and did not know of, or report its passage and none of the crew on that train were aware of the fact that extra No. 159 was coming west. The railroad had but one track. At 1:05 a. m. No. 159 reached Garrison and that fact was reported to the train despatcher. Thereupon he asked the telegraph operator (station agent) at Bonita by telegraph whether extra freight No. 162 had arrived there, and the operator promptly answered that it had not. The train despatcher then ordered the train crew of No. 159 to run extra from Garrison to Missoula and to meet No. 162 at Carlan, and this order was duly received by that crew at Garrison. At the same time he ordered the crew of No. 162 to meet No. 159 at Carlan and sent this order to the operator (station agent) at Bonita to deliver to them. At the same time he ordered a red signal displayed at Drummond to stop No. 159 there so that the meeting point could be changed on its arrival there if necessary. These orders were complete at 1:18 a. m. At 1:20 a. m. No. 159 left Garrison and arrived at Drummond at 1:57 a. m.; the train despatcher was immediately informed of this fact. He then inquired of the operator (station

agent) at Bonita whether extra freight No. 162 had arrived at Bonita yet and the latter promptly replied "No sign of them yet." He then asked the operator if he was sure No. 162 had not passed and the latter replied yes. The train despatcher again repeated his inquiry and the operator at Bonita answered, "Yes, I am sure extra 162 has not passed." Thereupon the train despatcher issued an order to the crew of No. 159 to meet No. 162 at Bonita and an order to the crew of No. 162 to meet No. 159 at Bonita and sent the former order to Drummond and the latter to Bonita. The crew of No. 159 received their order and proceeded with their train. It collided with No. 162 and Dixon was killed by the collision about four miles west of Drummond at 2:15 a. m.

The above statement will be made more clear by the following diagram.



ARGUMENT.

The questions certified should not be regarded as open questions in this court. In principle the case seems to us like several which the court has passed upon.

In the case of *B. & O. Railroad v. Baugh*, 149 U. S. 368, where the injured servant, a fireman, was subject to the orders of the engineer, it was held that they were fellow servants; and the principle to control such cases was settled to be, in the language of the opinion, p. 387:

> "Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

In the same case (p. 385) the court, in defining what are the positive duties of a master to his servants, said:

> "Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employe with fit and careful co-workers, and the employe has a right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant,

it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and, therefore, an improper employe is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as the result of such reasonable inquiry is satisfied that the employe is fit and competent, can it be said that the master has neglected anything, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employes who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken notwithstanding the reasonable precautions he has taken Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow-servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care, that the master

can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him responsibility for such employe's negligence.

"Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in those respects."

The court in *Northern Pacific Railroad v. Peterson*, 162 U. S. 346, following the *Baugh case* again enumerated (p. 353) the positive duties of a master, saying:

"The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employes, and if the employe suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

In *New England Railroad Co. v. Conroy*, 175 U. S. 323, the court reviewing all its prior decisions overrules *Chicago, Milwaukee & St. Paul Ry. Co. v. Ross*, 112 U. S. 377. Since this decision it seems

no longer permissible to doubt the controlling character of the test of liability given in the above extracts from the opinions.

In the last case the court quotes at length from and approves the opinion of Chief Justice Shaw in *Farwell v. Boston & Worcester Railroad*, 4 Met. 49, and approves, on p. 331, the following statement of Lord Chancellor Cairns:

> "The master is not and cannot be liable to his servant unless there be negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master."

In *Quebec Steamship Company v. Merchant*, 133 U. S. 375, the ship's company consisted of 32 persons divided into three classes of servants, called the deck department, the engineer's department and the steward's department. The accident in question was caused by the negligence of a carpenter inflicting an injury upon the stewardess. But it was held that they were fellow servants engaged in the same common employment. It was decided in *Oakes v. Mase*, 165 U. S. 363, that

the relation of fellow servant existed between the engineer of one train and the conductor of another train. In *Northern Pacific Railroad Co. v. Poirier*, 167 U. S. 48, a brakeman of a regular train and the conductor of an extra were held fellow servants, and in *Northern Pacific Railroad Co. v. Charless*, 162 U. S. 359, a day laborer at work on the track was held to be a fellow servant with the engineer and conductor of a train. In the leading case of *Farwell v. Boston & Worcester Railroad Corporation*, approved by this court in *New England Railroad Co. v. Conroy*, it was held that those employed on the trains of a railroad are fellow servants with those engaged to tend the switches.

Whether there is any exception to the principle, that to make the master liable the negligent act must be in respect of some thing wherein the master owes a positive duty to the servant, it is not necessary to inquire. That is, it is not necessary in this case to say whether the master may, regardless of the principle stated, be liable for the act of one placed at the head of a department. For the decisions already made by this court are conclusive that the departmental exception (if there is any such) does not arise as between servants all of whom are engaged in the general purpose of operating trains. The telegraph operators, the switchmen, signalmen, flagmen and trainmen are all in what is spoken of by Mr. Justice Brewer in the *Baugh case* as the operating department; they are all engaged in moving the trains. The relation between train-

men and telegraph operators in this work cannot be distinguished from the relation between trainmen and switchmen or other signalmen. The telegraph operator is a signalman. It is his duty to set out signals and to communicate telegraphic orders to the trainmen; also to learn from the trainmen and his own observation the movement of trains and convey such information to the superintendent or despatcher.

To hold that a telegraph operator and a trainman are not fellow servants, the proposition must first be established that the master owes a positive and personal duty to servants in respect of the collection of the information upon which the despatcher's train orders are based, and in respect of the communication of train orders to the train men. But that proposition seems to be precisely contrary to what the court has often decided. Beyond the duty of the master to provide the servant with a reasonably safe place to work and with reasonably safe machinery, and possibly to adopt and promulgate safe and proper rules for the conduct of business (*Northern Pacific Railroad v. Peterson, supra*), the obligation of the master is only to select competent servants. The master has not contracted or undertaken to execute in person the work connected with the business. The record states that the railway company in this case had adopted reasonable rules for the operation of all its trains, and the time tables did not and could not provide for the running of extra trains. These trains had to be moved upon telegraphic orders based upon information furnish-

ed by the station telegraph operators to the despatcher who issued the orders. And these facts were well known to the deceased.

A telegraph operator has neither power nor authority to make rules, give orders, or in any way control or direct the trainmen or the business. He is only the medium through whom orders are communicated and by whom information from and of the trains is communicated to the superintendent or despatcher. If an engineer telegraphs through the station agent to the despatcher, the duty of the station agent in that case is no different from that of a switchman who signals that a switch is thrown, or from that of a brakeman who communicates information or orders by signal or otherwise between conductor and engineer. The duty of the telegraph operator is merely to give notice or convey information. Such notice or information is also communicated by means of flagmen, trainmen, signalmen, lights on signals or on trains, and in other ways and is a necessary part of the movement of the trains. The subordinate employes whose duty it is to convey such information are engaged at the same time and place with the persons operating the trains in a common employment having one immediate object, the running of the trains. They are therefore fellow servants. No man giving signals or passing information from one employe to another exercises the discretion or judgment or control of the master, but each contributes his part to the safe running of the trains. Taft. J., in *Balti-*

more & Ohio Railroad Co. v. Camp, 31 U. S. App. 213, 236.

The case of *Camp* just cited discusses the prior decision of the same court in *Cincinnati, New Orleans & Texas Pacific Railroad Co. v. Clark's Administrator*, 16 U. S. App. 17. There an engineer was injured by the failure of a telegraph operator to signal to him that a train had passed less than ten minutes before. In that case it was decided that the station agent in conveying information of facts within his own observation was within the principle of *Randall v. Baltimore & Ohio Railroad Co.* 109 U. S. 478, a fellow servant of the engineer. In the *Camp case* the court held that there was no distinction between the failure of the station agent properly to communicate orders and his negligence with respect to facts within his own observation which it was his duty to communicate, saying on page 241:

> "The duty of the company is to provide general time tables and general rules and rules for all possible emergencies, and to communicate them to its employes affected by them, because this is reasonable and possible. The circumstances are such and the time within which the communication can be made is so ample that the company can have no excuse for failing to make it. But an employe who enters the service of a railway company knows that the transmission of a temporary change in the time table occasioned by an emergency, and calling for immediate action, must be through telegraph operators and signalmen who are stationed along the road, working with him at the same time and place for the immediate common object of running trains, and therefore he must

be held to assume the risk of negligence in those persons thus engaged with him in exactly the same work. The only obligation which the company can be held to with respect to the communication of a sudden and temporary change in the running times of trains by telegraphic order is that, so far as those who represent the company are concerned, all reasonable care shall be taken in transmitting notice of the temporary change.

"Meeting exactly the same contention in *Slater v. Jewett*, 85 N. Y. 61, 72, Chief Justice Folger, after fully conceding the master's duty to see and know that his general time table is brought to the knowledge of his servants who are to square their actions to it, said: 'It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employe takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable machinery, or of competent and skilled fellow-workmen. It is the act of an hour or of an instant which for any useful effect to be got from it must be done at the instant, and

> that, too, from a distance. * * * The reasonable rule in such case hath this extent, and no more, that he (the master) must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication, according to prescribed general rules and regulations devised from the best experience in such business, and if among those means is the service of a fellow servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service.' "

In the case under consideration the precise negligence of the operator was his failure to observe and report to the despatcher the passage of a train by his station, which resulted in the despatcher giving orders for another train to move in the opposite direction. The operator was as much a fellow servant of the fireman in the performance of the duty of observing the passage of trains by his station and reporting to the despatcher, as in communicating orders of the despatcher to trainmen. Indeed in communication of orders an operator seems *more nearly* a vice principal than in this case (31 U. S. App. 240). The trainmen know that in the ordinary course of business the despatcher in directing the movement of trains must necessarily rely upon the observation and report of station operators, and they know that if an operator is negligent and fails to observe and report correctly the natural and probable result is wrong orders and a collision. In entering the employment they therefore assume the

risk of injury caused by negligence of station operators in the performance of this duty.

This precise question was passed upon by the Circuit Court of Appeals of the Sixth Circuit in the case of *Illinois Central Railroad Company, v. Bentz*, 40 C. C. A. 56, where a failure of the telegraph operator to keep the train despatcher advised as to the whereabouts of a train was, as in this case, the cause of wrong orders resulting in a collision. The Court, Taft, Lurton and Day, judges, held that the case was controlled by *Railroad Company v. Camp, supra*, between which and it there was no distinction. See also *Railroad Company v. Frost*, 44 U. S. App. 606; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38; *Sutherland v. Troy & Boston Railroad Co.*, 125 N. Y. 737.

C. W. Bunn,
Emerson Hadley,
James B. Kerr.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.
No. 211.

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ALLINE A. DIXON, ADMINISTRATRIX OF THE ESTATE OF CHAUNCEY A. DIXON, DECEASED,
Defendant in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ARGUMENT FOR THE DEFENDANT IN ERROR.

BY A. M. ANTROBUS, *Attorney.*

D. J. O'CONNELL AND
R. J. BURGLEHAUS,
Of Counsel for Defendant in Error.

(18,826.)

ARGUMENT.

I.

The first question certified to this court is: "When a local telegraph operator is called upon *specially* by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense, that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher, that was induced by false information given by the local operator?"

Under the certified facts, is the question material? Complainant stated, "that it was the duty of defendant when it undertook to run said trains in opposite directions on the same track, to frame and promulgate a special schedule, and give such orders, and use such physical means for their running, with the knowledge of the conductor of train No. 162, which, when obediently observed by him, would be reasonably safe for those engaged in their operation. That the defendant failed to discharge this duty, in that it gave such orders, and used such physical means for the running of said trains, that resulted in the collision that caused the death of her intestate." The charge is definite as to the duty of the company, and the facts are admitted which show the collision was the result of making Bo-

nita a meeting point for the trains to pass after train 162 had passed it, and without giving information to the operatives of 162 either actually or constructively of the danger to which they were exposed. Under these facts, the real question is: did the company owe a positive duty to the trainmen of 162 when it sent 159 west from Garrison or Drummond, to make a meeting point where the trains could pass in safety, and in some manner notify trainmen of 162 of this place, to avoid impending danger? If it did, then the negligence of the operator has nothing to do with the matter of fixing the liability of the company, because it ought not to be permitted to shift the burden of its duty on an inferior servant, and allowed to escape liability for the negligent doing of that which was its duty to have carefully performed. That if it shall be permitted to go behind the train dispatcher, then, as it was its duty under the circumstances to make a place where the trains could pass one by the other in safety, the operator was discharging a master's duty. Such being the case, in no sense was he a fellow servant of the trainmen on 162. The court in deciding this case said:

"It is undoubtedly a rule of law, and a reasonable one, that a railroad company should provide safe schedules of times for the running of trains, so that there will be no danger of collisions, if the times were observed by the men in charge of the trains running thereunder; and if from any reason, the ordinary schedules have to be departed from, as they are continually, still it is the duty of the railroad company under such circumstances, to use reasonable care to advise those in charge of other trains on the road of the movement of such trains, so as to avoid collisions."

Will the authorities sustain the holding of the court? In *Baltimore & O. R. R. Co. vs. Andrews*, 1. C. C. App., 639, the court said:

"Besides there is no difference in principle between the regular printed time table or schedule and a special schedule or time table sent by telegraph. In either case the movement of the train is directed by the company, and in both cases the control and management of the train under way, whatever the orders, are vested in the conductor and engineer."

The company directs when it shall start, when and where it shall stop, and when and where it shall pass other trains. To accomplish this, it gives certain orders to the conductor through its train dispatcher, and while the train is being moved it is under the control of the conductor. In *N. P. Ry. Co. vs. Poirier*, 15 C. C. Apps., 52, the facts were: Two trains were running in the same direction very close together. The first or head train was a regular freight running under schedule time. The second was running under telegraphic orders. The first stopped at Clyde Spur to side-track some empty cars. While thus engaged, the second train ran into its rear end, on account of which the middle brakeman of the first received injuries while attempting to uncouple cars. There was no evidence that the conductor of the second train violated his orders. The proofs showed that he was not notified that the first train would stop at Clyde Spur. The court on page 60 says:

"It was the duty of the defendant when it put the second train in motion to make suitable provision and exercise reasonable and ordinary care for its safe management to guard against accidents. This was a positive duty, which it owed to its employes; and if this

was delegated to any particular agent, and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the company. This principle is distinctly announced in the Baugh case."

In the case cited, the company owed the duty to notify the conductor of the second train that the first would stop at Clyde Spur, to guard against collision. In the case at bar, 162 had left Missoula and was on its was east, running obediently with its orders before 159 was sent west from Garrison. When the company sent west 159 from Garrison, or Drummond, it owed a duty to train operatives on 162 to make a point for the trains to meet, and in some manner notify them of this fact. It matters not to whom it entrusted this duty, nor his position. If the company owed the duty, and the duty was not performed, then there was a violation of it, and whosoever brought about the violation must have acted in the place of the company, and could not have been in the very transaction a fellow servant of the train operatives, who were running their train in obedience to orders given them. It matters not whether it was a train dispatcher or a local operator that caused the violation of the duty of the master to the train operatives; that person could not be a fellow servant of the trainmen in such sense as to exhonerate the master from liability caused by a violation of duty which it owed its servants.

Lewis vs. Seiffert, 11 Atl., 514, is a well considered case. The court lays down the doctrine, that it is as much the duty of a railroad company to give *correct* orders for the movement of trains, as it is to provide

a reasonably safe road, cars, locomotives and machinery for the operation of its road. The court says:

"But there are some duties which the master owes the servant, and from which he cannot relieve himself except by performance. He owes the duty to every employe of providing a reasonably safe place in which to work, and reasonably safe tools and machinery with which to work. This is a direct, personal and absolute obligation, and the master may delegate those duties to an agent, and such agent stands in the place of the master. It is therefore very plain, that it was the duty of the defendant, as between it and its employes, to provide a reasonably safe road, good cars and machinery for operating its road. It is equally its duty to frame and promulgate such rules and *schedules* for the moving of its trains as will afford reasonable safety to the operatives engaged in moving them. This is a direct an positive duty, which the company owed its employes, and for the failure to perform which, it will be responsible to any person injured in consequence thereof, whether such person be passenger or employe."

The court further on in the opinion says, that it would be a monstrous doctrine to hold otherwise. There are a line of cases in which the facts are, that the orders given for the movement of the trains were correct, but because the operator failed to deliver them to the conductor, to whom they were addressed, and the train was permitted to go ahead, which brought about a collision. In these cases, under the facts stated, the courts hold: First, that it is a positive duty of a railroad company to give *correct* orders for the movement of its trains, and in some way notify train operatives of a change of schedule. That when it has given correct orders, and sent them by telegraph to the local operator to be by him delivered to

the conductor on the arrival of the train, it had performed its duty. That in the act of manual delivery of the order by the operator, his act in this respect is that of a fellow servant with the trainmen. That he acts as a messenger boy between the dispatcher and conductor.

In *R. R. Co. vs. Camp*, 13 C. C. Apps., 233, the facts are, correct orders making a meeting point for the trains had been sent to the local operator before the arrival of the train, which he failed to deliver, and because of such failure, the train proceeded on its way and collided with another. The contention was, that it was the duty of the company to bring to the actual knowledge of the conductor the contents of the order. The court on page 240 of the report says:

"Again, the railway company is bound to provide general rules and general time tables for the reasonably safe operation of its railway system, and also rules applicable to all emergencies likely to arise. It is inevitable that at times and in certain emergencies the general time table must be set aside. *It then becomes the duty of the company to construct a temporary time table with such care and skill, that it may be reasonably adapted to secure the operation of all the trains on the road without accident to passenger or employe.*"

This holding is in line with that in the Andrews case, in which it was held that in principle there is no difference between a time table sent by telegraph and the regular printed time table. No one will contend, if a collision resulted from an incorrect printed time table, but the company would be responsible; and it would not be permitted to go behind such time table to find excuse by laying the fault on the person who devised it, and say that such person was a fellow ser-

vant of an injured trainman from such collision; then why in case of a special time table? In *Oregon Short Line and U. Ry. Co. vs. Frost*, 21 C. C. Apps., 186, the facts were the same as in the Camp case, and the contention of the plaintiff below the same. The court held the company had discharged its duty when it had given information to one of its servants in the same common employment and directed him to deliver the order to the conductor. In the case at bar the company had not discharged its duty, in that it did not give *correct* orders, and did not deliver, or attempt to deliver any orders to the conductor of train 162 changing its schedule. In *Darrigan vs. R. R. Co.*, 56 Conn., 285, the court said:

"It is the duty of a railroad company to prepare a time table, and adjust the running of trains to it, as to avoid collisions. It must also devise some suitable means and *safe method* for the running of special or irregular trains."

If such is the case, and the company uses a local operator for the purpose of preparing the special schedule (for without his act it could not be created), then in what sense, in the act of *creating the schedule*, can it be said he was a fellow servant of the trainmen affected by what he did?

II.

It was as much the duty of the company to give correct orders for the running of its trains so they would not collide, as was its duty to see that its servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work. That the one furnishing

the tools is the agent of the master and not a fellow servant of the one using the tools and machinery. That for this agent's negligence the master is liable.

In *Hough vs. R. R. Co.*, 100 U. S., 213-226, this court said:

"Within the rule laid down in *Farewell vs. R. R. Co.*, 4th Met. 49, they are to guard the servant against such risks and perils of which he is not as likely to know as the master, and against which he cannot as effectually guard. Among such duties are supplying the servant with reasonably safe machinery and tools, because the servant has ordinarily no connection with their purchase, or their preservation in a suitable condition after they have been supplied. It is equally implied in the contract of service, that the master shall supply the *physical* means and *agencies* for the conduct of his business. It is also implied, and public policy requires, while selecting such means, he shall not be wanting in proper caution. His negligence in this respect is not a hazard ordinarily attending the business."

The reasons given why the obligation rests on the master to furnish tools and machinery which shall be reasonably safe are: One, because the servant has no connection with their purchase; the other, public policy requires such to be the law; both to the single purpose, that the master shall not expose his servant to a risk of which he is not as likely to know as himself, and against which he cannot as effectually guard. The master furnishes the tools and machinery with which the servant is to work. He ought to know whether they are reasonably safe, and not leave it to the servant to find out at the risk of his life. What is a special schedule for the operation of trains but a *physical*

means, or *appliance*, in accord with which the trains are operated? The court said in the Andrews case cited, "there is no difference in principle between the printed time table and one sent by telegraph." It certainly will not be contended that the printed time table is not one of the physical means in accord with which trains are operated, and if a collision should result because when run in accord with the same a servant was harmed, who was running the train, the company could escape liability? The company sent the order to 159 to run west, that brought this train in collision with 162. Trains cannot be run without a schedule, either printed or sent by telegraph. The trainmen have no connection with, neither are they in the same department with those who furnish the tools and machinery with which they are to work, or to see that they are kept in suitable repair. Neither are they in the same department, and have no connection with those who furnish the schedules or give orders which the trainmen use in running the trains. In fact there is better reason for the rule applying to schedules for the running of trains, than to tools and machinery, or a safe place in which to work. The engineer may have the opportunity to observe the condition of his engine. The brakeman to see that the ladder on which he mounts the car is out of repair, but as to the schedules which they use in running the trains, they have absolutely no connection with their creation, and have no opportunity to know whether they are correct, or any knowledge of any hazard that may be created thereby, and against which they can guard. No better illustration of this proposition can be made than is shown by the facts of this case. Every reason for the

rule that the master is obligated to furnish tools and machinery with which his servant is to work shall be reasonably safe, applies to making a schedule for the running of trains. That such duties are non-assignable is well settled.

Hough vs. R. R. Co., 100 U. S., 213.

N. P. R. R. Co. vs. Herbert, 116 U. S., 642-660.

It will not be contended, that the one who purchases the tools or machinery, or sees to the place where the servant works, is a fellow servant with the one who uses the tools or machinery, or works in the place, in *such sense* as to releive the master; if from his negligent act the tools or machinery, or the place is in fact unsafe. If the making of the schedule, or the giving the orders that caused the collision in the case at bar was one of the perils or hazards the trainmen on 162 did not assume, then what position does the operator sustain to the transaction as shown by the certified facts, if it be his negligence caused the collision? Evidently he was not a fellow servant of the trainmen on 162 in such sense as to releive the company from his negligence; for if he was such fellow servant, then it would overthrow the rule, and the company would escape liability, although it knew of the danger, and could have guarded the servant, and that with full knowledge that the servant was ignorant of the hazard and could not protect himself.

In analysis the rule laid down in the Farewell case is in harmony with that in the Baugh case, 147 U. S., 149—167. In the Farewell case, 4th Met., 49, the court said:

"The general rule resulting from considerations, as well of justice as policy, is, that he who engages in the employment of another for the performance of specified duties, takes upon himself the natural and ordinary risks and perils of the business, and in legal presumption the compensation is adjusted accordingly. We are not aware of any principle which would except the perils arising from carelessness of those who are in the same employment. *These are the perils of which the servant is as likely to know as the master, and against which he can as effectually guard. They are the perils incident to the service, and can be as distinctly foreseen and provided for in the rate of compensation as any other.*"

Here is laid down the doctrine of assumption of risks by the servant. They are such as are naturally and ordinarily attendant to the business. The test to determine what are such risks is, if the servant is as likely to know of them as the master, and can as effectually guard himself against them as the master, then they are such as he assumes by his contract of employment; but if the servant has not the same means of knowledge of them as the master, and cannot as effectually guard himself against them, then they are not the natural and ordinary risks of the employment, and the servant does not assume them. Taking it for granted that the train dispatcher at Missoula stood in the place of the master, and apply the above test to this case. Trainmen of 162 had no knowledge that the dispatcher had sent 159 west from Garrison, or Drummond, which caused the collision, When the dispatcher sent west 159 from those places he knew 162 was on the road east. He knew of the peril thus created, unless he made a meeting point for one train to pass the other, and had notified the trainmen of both

trains of this meeting point. Of this peril the trainmen of 162 were wholly ignorant, and could not protect themselves as the dispatcher could. The dispatcher could have held 159 either at Garrison or Drummond till he knew of the whereabouts of 162, and with absolute knowledge have made a safe meeting place for the two trains to pass, and have notified the trainmen of 162 of this place. Tho hours and twenty-seven minutes had elapsed from the time 162 had left Missoula when 159 arrived at Drummond. Bonita is only twenty-six miles east of Missoula. When the inquiry was made, when 159 was at Drummond, the train dispatcher under the circumstances should have known, that either 162 had passed Bonita, or was a wreck on the road between Missoula and Bonita. Trainmen on 162 had no knowledge of the facts and circumstances as the dispatcher, and could not as effectually guard themselves as the dispatcher. They had no means of protecting themselves as the dispatcher. It follows under the rule in the Farewell case, the peril to the trainmen by sending 159 west from Drummond and directing it to pass 162 at Bonita, was not one of the ordinary risks which the trainmen on 162 assumed. If it was not one of such risks, then that negligence which caused the injury was not of one who was a fellow servant of the trainmen on 162 in *such sense* as would relieve the company from responsibility. In the Baugh case, 149 U. S., 167, this court laid down the rule that all who enter the employment of a single master are engaged in a common service, are fellow servants, "*prima facie*" (i. e. unless rebutted), and some line of distinction than that of control must exist to destroy the relation of fellow servants. Hav-

ing done away with the thought or idea of superiority or control, it establishes the test to determine the liability to be, whether there was some personal wrong or breach of positive duty on the part of the master. Whether there was a breach of positive duty is determined by the nature and character of the act. The character of the act in the case at bar was: the company sent west from Garrison and Drummond train 159, knowing that 162 was on its way east, no one of its operatives having knowledge that 159 was on the road. By this act the positive duty rested on the company to make a place where the trains could pass each other and in some manner notify the trainmen of 162 of this fact. It owed this duty because it had created the exigency that demanded its discharge. The person whose negligence caused a breach of this duty, necessarily could not be a fellow servant in any sense of the trainmen of 162. Those risks of which the servant is not as likely to know as the master, and against which he cannot as effectually guard himself, are the perils which from their nature and character demands the master to protect the servant against, and for his failure to do so he becomes liable.

III.

The answer to the first question propounded should be: the local operator is not a fellow servant of train operatives in such sense as to exonerate the master from liability to operatives injured by obeying an erroneous order of the train dispatcher that was induced by false information given by the local operator.

We have shown that it was a positive duty of the

company to give *correct* orders for the running of these trains; to make a meeting place for them to pass, and in some manner notify the trainmen of 162 of this place; that the risk created by giving incorrect orders for their running was not one of the assumed risks of the operatives on train 162. That in no proper sense can it be said that the local operator at Bonita was a fellow servant of the operatives on train 162. The question is whether the operator when "*specially inquired of by the dispatcher.*" Our contention is: it was the duty of the dispatcher to give correct orders for the meeting of the trains, and in some manner notify the trainmen of 162 of them. That in the transaction which took place between the dispatcher and the operator, the latter was not consociated with any of the trainmen, but was consociated with the dispatcher, who stood in the place of the master. The lower court held the rule to be, and it is in accord with the weight of authority, "that a telegraph operator in delivering orders from the dispatcher to the trainmen is a fellow servant of the trainmen; that he was acting with reference to the movement and safety of the trains in the same manner that a flagman or a switchman would be in the discharge of their duties. No case has been found, except in the case of *Bentz vs. R. R. Co.*, 99 Fed. R.. 657, that an operator or any one else, who answers any inquiry, with reference to what a train has done, or in respect to any condition of the road, that that part of service makes him a fellow servant with the train operatives." It cannot be said when the operator reported to the dispatcher that train 162 had not passed his station (when in fact it had), he was co-operating with the conductor of that train,

which was then running in accord with the orders that had been given it, and after it had passed his station. He was answering the dispatcher solely as to a condition of the road. But it may be said, if the operator had given a correct report, the dispatcher could have stopped and held 159 at Drummond, and have made Drummond a meeting point for the trains. Concede it, still he was not co-operating with the trainmen of 162 as to its movements. He was co-operating with the dispatcher as to the movements of 159. He and the dispatcher were attempting to get 159 through west without its colliding with 162. In so far as 162 was concerned, what the operator said had nothing to do with its movements. It had passed his station before the dispatcher called him; before 159 had arrived at Garrison from Butte. No telegraph offices were open between Missoula and Garrison except Bonita and Drummond. No. 162 could not have been stopped till it reached Drummond, because of the absence of any opportunity to reach it by telegraph, till it had reached Drummond. Had the operator told the truth all the dispatcher could have done, would have been to hold 159 at Drummond till 162 had arrived at that place. As the operator told a falsehood concerning the whereabouts of train 162, what effect did this have on the situation? If any, it had this: It prevented the dispatcher from holding 159 at Drummond. In no sense was he co-operating with, or consociated with the trainmen on 162, or with those on 159; *but was with the dispatcher in directing the movements of 159.* As between the trainmen on 162 and the company, it was its duty to stop 162 if it became necessary to prevent a collision. This follows because it had set it in motion.

Since the dispatcher sent out from Missoula 162, and from the time sent out, till the collision, it was running under the orders given it, and at no time could have been stopped before its arrival at Drummond, had the operator told the truth, he did not come between the dispatcher and the trainmen of this train, or in connection with them by anything he did; it follows that he had no connection with the men on this train, either in directing its movements, or stopping it after it had been started. The first question submitted involves the determination of the relation which the operator sustained to the trainmen on each of these trains. If for any reason he was related, by cooperating or otherwise, through the dispatcher with those on 159 (which we do not concede), he was not with those on 162, of which deceased was the fireman. The court to sustain its opinion as to the law cited *Dana vs. R. R. Co.*, 92 N. Y., 639. In connection with the Dana case we refer the court to *Shehan vs. R. R. Co.*, 91 N. Y., 332, both of the above cases growing out of the same accident. The facts were, train 50 was running east, and was due at Cayuga at 4:40 p. m. Train 337 was running west, and at Auburn. At 4:46 the dispatcher telegraphed the conductor of this train, "wild cat to Cayuga regardless of No. 50." As No. 50 was about to depart from Cayuga at 4:45 on its schedule, a collision between these trains was inevitable, unless something was done to prevent it. But the campany had an operator at Cayuga named Keiffer. At 4:10 the dispatcher telegraphed him: "Hold 50 for orders." Keiffer met the conductor of 50 and told him: "Orders hold 50 for 61." No. 61 soon afterwards came in, when the conductor of 50, relying on the re-

port of the operator, started his train for Auburn. Here was a false report of the orders from the dispatcher made to the conductor of No. 50 by the operator. Soon after No. 50 started it collided with 337, in which collision the fireman of No. 50 was killed. Keiffer was employed to receive and deliver messages, and send them when required. Under the facts as cited, the court said:

"No reason is given for not communicating with the conductor and engineer of 50 before it reached Cayuga, or at least on its arrival there. The defendant annulled its time table, made it imperative on No. 337 to move in spite of the pre-arranged right of No. 50, and not only omitted as to 50 the exceedingly proper and wise conditions on which 337 was permitted to obey, but failed to give any communication to 50. *The object should have been to prevent 50 from running according to its time table.* To secure certainty in this respect, the defendant should have communicated with the conductor and engineer of 50, that these servants would understand the object, etc. Two parties were involved, the master and its servants upon this train, and the only hazard was disobedience or forgetfulness on the part of those servants. In the method adopted another event was introduced, upon which the first was made dependent. Instead of communicating with the conductor and engineer, the defendant communicated with a third person, the telegraphic operator, and told him "to hold the train for orders." The train thereby became subject to his will, and the object in view became dependent on his memory, and his faithfulness in obeying the orders, and the probabilities of its attainment thereby lessened."

The court further said:

"The defendant had created the exigency and was bound in some way to adjust the running of train 50 to it, and for the consequences for the omission of any reasonable act tending thereto it was liable. It was

not enough to tell Keiffer to hold the train. The duty of holding it devolved on the defendant, and its breach of duty was not excused by showing that it would have been held if Keiffer had performed his duty."

In this case train 162 stands almost precisely as train 50, and train 159 as train 337. Train 162 was running under orders, and the company annulled its schedule, made it imperative on 159 to move west in spite of the pre-arranged right of 162; for it must be borne in mind that 159 was sent west from Garrison after 162 had left Missoula, and that, after it had passed Bonita, No. 162 had the right of way as No. 50 had. The time table of 50 was annulled by direction to Keiffer to hold it for orders. The time table of 162 was annulled by the direction of the dispatcher to the operator to notify the trainmen of 162 on its arrival to pass 159 at Carlan. When 159 reached Drummond, on the second inquiry, and the reply given it, the time table was annulled—to pass 159 at Bonita. In fact there was no annullment of the schedule of 162, but only an attempt to do so. Neither was there an annulment of the time table of No. 50, but the attempt. There could not have been unless the orders had been correctly reported by Keiffer. There being no annullment of the time table of 162, and it could not have been annulled till it had reached Drummond, and communicated with, 159 was sent west which caused the collision. The object should have been to prevent 162 from running according to its schedule time, and to secure certainty in this respect, the company should have communicated with its conductor, that these servants should understand the object in view. Two

parties were interested, the master and his servants on train 162, and the only hazard as to these servants was their negligence. Instead of communicating with them, the company communicated with a third party, the operator at Bonita, to make a place where their train should pass 159, and directed the operator to communicate with them. The only difference between the Shehan case and the one at bar is; in the Shehan case the operator made a false report to the conductor of train 50, because of which it went ahead and collided with 337. In this case the operator made a false report to the dispatcher, because of which 159 went ahead, and collided with 162. Under the circumstances of this case train 159 became subject to the will of the operator at Bonita, as held by the court in the Shehan case train 50 became subject to the will of the operator at Cayuga; and that he was acting in the place of the master in the very transaction. However, as to the movements of train 162, what the operator reported to the dispatcher had no connection, as it had passed his station before he had been called, and in no event could it have been stopped till it had reached Drummond, had the operator told the truth. What the operator said did not have anything to do with its movements, or stopping it after it had been started. He was not therefore a fellow servant with the man firing its engine.

IV.

If it is the law, that when an operator has been specially called upon by the dispatcher to give information relative to the arrival of a train at his station, to

enable the dispatcher to formulate orders for the movement of other trains, is discharging a master's duty, then he would not be a fellow servant of the trainmen in such sense as to releive the master from liability for injuries caused by his negligence. When the court in the Baugh case laid down the rule, "the servant has the right to look to the master for the discharge of a positive duty, and instead of doing it himself intrusted it to others, that does not change the measure of his obligation to the employe, and the question turned on the character of the act, than the relation of the employes to each other; and if the act is one in the discharge of a positive duty by him owing to the servant, then the negligence in the act is the negligence of the master;" it set the question at rest and settled the proposition that the author of the negligent act need not necessarily be some superior servant; and it matters not whether the negligent act be that of a local operator or train dispatcher. In this case the dispatcher had sole power to give orders for the running of trains. If he stood in the place of the master, and it was the master's duty to give correct orders for the movement of the trains in question, and held converse with the local operator in reference to the matter, then the operator would be the agent of the master, and discharging a duty personal to the master, and not a fellow servant of those affected by the orders which the master gave. Suppose it was the duty of the master to see that an iron rail was properly loaded on a car, and should call to his assistance one in his employ, and through the negligence of the one called, in the act of loading the rail, another servant not engaged in loading the rail, should be harmed,

would the one called to assist the master be a fellow servant of the one injured in *such sense* as to relieve the master from liability? It was the duty of the master to give correct orders for the movement of the trains in question. He called on the local operator to assist him, and through the negligence of the operator the fireman on train 162 is killed, who had nothing whatever to do with making the schedule, For what reason then can it be said that the fireman was a fellow servant with the operator in making the schedule? As applied to this case, in attempting to annul a schedule that had been made, with the making of which and the annulment of the same the fireman had nothing to do.

In *Dana vs. R. R. Co.*, 92 N. Y., 639, which the lower court cites as sustaining its opinion, the court said:

"No doubt the intestate on entering the employment assumed the ordinary risks attending the employment, but it is equally well settled, that employers cannot avail themselves of this assent unless they have taken reasonable precaution to insure the safety of the servant while in the performance of assigned duties. The principle therefore which secures this exemption has no application where the injury is traced to the employer's personal failure to take such precautions; nor where they knew of the existence of the danger of which the servant had no means of knowledge."

On page 641 and 642 the court said:

"Keiffer, the operator, was directed by the superintendent to hold 50 for orders. For Keiffer's act in this respect the defendant is clearly liable. The act he was required to do, and did perform, was one for which the master was responsible as a duty pertaining to itself, and as to it, Keiffer occupied the place of the master."

He was not then a fellow servant with the trainmen on No. 50 in such sense as to relieve the master from liability for his negligence in giving the false report to the conductor of No. 50. In this connection we call the court's attention to the following:

Flike vs. R. R. Co., 53 N. Y., 549.

Booth vs. R. R. Co., 91 N. Y., 38.

Ell vs. N. P. Ry. Co., 12 L. R. A., 97.

A local operator in a general sense (i. e., in most of the transactions in which he is engaged), may be a fellow servant with the trainmen, but that this is the case in transactions as shown from the facts in this case, where he has been called upon by the *dispatcher, who in the act done*, was not a fellow servant of the trainmen, cannot be true.

In *B. & O. Co. vs. Camp*, 13 C. C. Apps., 244, the court states the rule of law:

"He, the operator, and the engineer and conductor work together at the same time and place for a common employer, with an immediate and common object in view, namely the running of trains, etc. There should be provisions for *communicating* to those in charge of trains to avoid collisions. This information is given by means of the genaral time table and the general rules for the running of trains, with reference to each other, which employes in charge of trains are obliged to obey. But it often happens that the general time table must be varied from, and these variations must be *communicated* to those in charge of trains. This is effected by telegraph orders from the train dispatcher, who has supreme control over the movement of trains. The subordinate employe whose duty it is to transmit the orders of the officer in charge, or to give information as to the presence of trains on any part of the road *without special orders*, are engaged at the same time

with the persons operating the trains in a common employment, having an immediate common object, namely, that of running the trains, therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop, is as much engaged in the running and the operating of the train as the flagman sent out to signal the condition of the switch."

The reasoning of the court was applicable to the facts of the case under consideration. In the Camp case *correct* orders had been given and received by the local telegraph operator, to be by him delivered to the conductor on the arrival of the train; and the sole question was, whether in the act of delivering them, the local operator was a fellow servant of the trainmen to whom the orders had been addressed; the contention of the plaintiff below being, that the duty of the company was to bring to the actual *knowledge* of the conductor the orders which had been sent. The point which the court sought to illustrate was, when correct orders had been sent to the operator before the arrival of the train, to be delivered to the conductor, the duty of the company ceased, and because of the position of the operator, and the duties required of him to *transmit* the order to the conductor, to whom it had been addressed, his relation to the trainmen was the same as "the man who makes the signal at the station for the train to stop." It must be borne in mind that the court in its decision holds the local operator to be a fellow servant with the trainmen when his acts are without *special orders* from the dispatcher. The court did not intend to commit itself to, and as a settled proposition of law, that when the operator had been inquired of *specially* by the train dispatcher concerning

a thing personal to the master, that the act of the operator, in reference to that thing, was a co-worker with, and a fellow servant of the trainmen. This is correct, because on page 246 the court said, "the only obligation which the company can be held with respect to a communication of a sudden change in the running time by telegraph is, that so far as those who represent the company are concerned, all reasonable precaution shall be taken in *transmitting* notice of the temporary change. Transmitting notice of the change of orders is entirely a different thing than that of giving correct orders creating the change. The question before the court was that of transmitting notice of the change of the schedule by the operator to the conductor; and it uses the words *transmit* and *transmitting* to acts passing between the operator and conductor. This is true because the court said, "but it often happens the general time table must be varied from and these variations must be communicated to those in charge of trains. That is, when the dispatcher had sent correct orders to the operator to be delivered to the conductor, it had used due care in transmitting notice of the change." It would be absurd to construe the opinion of the court otherwise, because it held, "that it was the duty of the company to construct a temporary time table with such care and skill that it may be reasonably adopted to secure the operation of all the trains on the road without accident to passenger or employe."

In *N. P. Ry. Co. vs. Mix*, 121 Fed. Rep., 476, plaintiff was head brakeman on train 162, on which the intestate of plaintiff below was fireman at the time he

was killed. The facts are fully set forth in the opinion, and do not materially differ from those certified in this case. In the Mix case, it appears 162 east was to run extra to Helena, and meet the second Nos. 53 and 153 at Missoula, and extra 155 at Bonner. Therefore 53 and 153 had arrived at Missoula before 162 had left that station. No. 162 met 155 at Bonner, which is 7.4 miles east of Missoula. The facts constituting the negligence of the operator at Bonita were the same as in this case. The court instructed the jury:

"That it is the duty of the company to all operatives on its road to take all reasonable precautions to prevent opposing trains on its railway from colliding, and to exercise all reasonable care to notify, or cause to be notified, the operatives upon one train of the approach of another in the opposite direction, *and to give such orders as will insure the safe passage of one by the other.*"

As we understand the instructions, if the jury found from the facts that such orders had not been given as would insure the safe passage of one train by the other, then it would be justified in finding the right of recovery in the plaintiff. If the instruction is the law, then in no sense was the operator at Bonita a fellow servant of the trainmen on 162. If he was, then the Circuit court of Apps. would have been bound to have held the instruction incorrect. The same court which decided the case *Oregon Short Line & U. N. Ry. Co. vs. Frost*, 21 C. C. Apps., 186, rendered the opinion in the Mix case. The Oregon Short Line case was based on the Camp case. The court in the Mix case say, page 480:

"Moreover, because we held in *Oregon Short Line and U. Ry. Co. vs. Frost*, as other courts, that a local

operator in *delivering* orders from the train dispatcher to the trainmen is a fellow servant of the latter, it by no means follows, that in answering inquiries of the train dispatcher upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen."

It is contended, that when a statement passes through the master, and is reported to the operator in the same form in which it is received, or when it takes the form of an order, which is a proper one, it is the same as if it had passed between those who were confessedly fellow servants. That is, when the operator at Bonita reported to the dispatcher 162 had not passed his station, and the dispatcher reported to the operator at Drummond that 162 had not passed Bonita, itwas the same as if the operator at Bonita had reported directly to the operator at Drummond; that it amounts to the same thing, when on the report, the dispatcher gives an order, based on the report to him; that it is the same as when a flagman reports the condition of the switch. To say the most, this is an ingenious method to eliminate the dispatcher from the transaction, and to relieve any railroad company from all liability from errors that pass through the dispatcher's office. Since all the information a dispatcher has as to the whereabouts of trains come from operators along the line of the road, it presents a wholesale method of relieving the company from liability for most collisions. The vice of the proposition is, that it takes for granted that the master owes no duty to give such orders for the running of trains that will not result in collision, and that he can change the schedule of times of running, without giving any information to those engaged in the running of the trains obediently to orders pre-

viously given them. The proposition has no parallel in the case where the flagman reports the condition of the switch to the engineer, because the master owes no positive duty to the engineer or operative of the train that the switch shall be properly set, or that the signal shall be set white or red.

It is claimed that the operator at Bonita had nothing to do with performing a master's duty. We have argued this proposition in the III. Subdivision hereof. Here was a transaction between the dispatcher and the operator to get 159 west from Garrison without its colliding with 162, to make a place for the trains to pass and in some manner notify 162 of this place. If the operator was in any sense a fellow servant with the trainmen, then the dispatcher was, because both were attempting to do the same thing. If the company under these circumstances is not liable for the act of the operator, then it would not be had the accident occurred through the fault of the dispatcher alone, and without having communicated with the operator.

V.

The opinion of the court in the case of *Illinois Cent. R. R. Co. vs. Bentz*, 40 C. C. Apps., 56, is in direct conflict with that rendered in this case. I do not find the opinion of Judge Lochren in this case published, is the reason for setting out a synopsis of it. After setting out the facts as per agreed statement the court said:

OPINION.

"It is undoubtedly a rule of law, and a reasonable

one, that a railroad company should provide safe schedules of times for the running of trains so there will be no danger of collisions, if the times were observed by the men in charge of the trains running thereunder; and if from any reason the ordinary schedules have to be departed from, as they are continually, and perhaps it is as suggested by counsel, a matter of daily experience, that certain trains, especially freight trains, are run without any general time table; still it is the duty of the railroad company under circumstances of this kind, to use reasonable care to advise those in charge of trains on the road of the movement of other trains, so as to prevent collisions. As I understand the law, the duty is not absolute so as to make the company a warrantor of the receipt of information by the person who ought to have informed the conductor or engineer. The decisions do not seem to be entirely uniform in this respect.

In the case of *Dana vs. N. Y. & H. R. R. Co.*, 92 N. Y., 639, the holding seems to be as to the operator whose duty it was, having received a notice by telegraph to communicate it to the conductor or engineer on the train, that his failure to do that, or the making a mistake by him in doing it, was attributable to the master; and that he was doing a master's duty by giving notice to the trainmen; and that by a mistake which he made, when he was directed to hold train No. 50 for orders, instead of that he notified the trainmen that it was to wait for 61, it was held that the mistake was attributable to the master, and that the railway company was liable for the collision that occurred by the train leaving when it should have remained there.

In the case of *R. R. Co. vs. Camp*, 65 Fed. Rep., 952, and *Oregon Short Line vs. Frost*, 74 Fed. Rep., 965, the rule seems to be laid down, and I think is in accordance with the weight of authority, that a telegraph operator in delivering such orders from a train dispatcher to the trainmen, is in the position of a fellow servant of the trainmen in doing that duty; that he is

acting in reference to the movements and safety of the train, in the same manner that a flagman or a switchman would be acting in the performance of any duty in connection with the movement, or the operation of the train, and participating therein. As far as that service affected the movements of the train, he would be a fellow servant of the trainmen. But no case that I have seen, unless it be that of *R. R. Co. vs. Bentz*, 99 Fed. Rep., 657, which has not been read, though it has been stated by counsel, briefly, on both sides, no case has been read in full, that holds the operator, or any one else, while he is not acting in connection with the movements of the train, who takes any action, or answers an inquiry, with reference to what a train has done, or in respect to any condition of the road, that that sort of service makes him a fellow servant with the operatives upon any train; and it does not strike me that it can be true. It is reasonable perhaps, that in delivering an order to a conductor or engineer while a train is at a station, that he is acting in reference to its movements the same as a flagman, or a switchman, and in performing that duty, he is a fellow servant with the trainmen; but after the train has left his station and has gone away, so that he can no longer affect its movements and has no control over them, I do not see how he would be longer a fellow servant of the trainmen."

In the Bentz case, in which the facts were the same as the one at bar, the court said, and this is all it did say on the question of fellow servantship:

"The failure of the operator to keep the train dispatcher advised as to the whereabouts of Bentz's train, was the cause of the collision, unless Bentz contributed to it by his own negligence. We have decided in this court in the case of *R. R. Co. vs. Camp*, 13 C. C. Apps., 233, that at common law a telegraph operator is a fellow servant with the engineer. See

Railroad Co. vs. Clark, 6 C. C. Apps., 281.

Slater vs. Jewett, 85 N. Y., 61.

Sutherland vs. R. R. Co., 125 N. Y., 737.

McKaig vs. R. R. Co., 42 Fed. Rep., 288."

The court simply refers to the Camp case and others to sustain its position. If the facts in the cases are so different from those in the case it had under consideration, it does not follow that the law applicable to them would be so to the case which the court was considering. In the Camp case accurate orders had been given by the dispatcher, without any converse with the operator as to the whereabouts of any train. They had been received by the operator, who failed to deliver them on the arrival of the train. The facts in the Slater case were the same as in the Camp case. In the Clark case no communication was had by the dispatcher with the operator in reference to the trains. The court on page 286 of opinion says:

"The negligence of Jenkins, the operator, did not arise from his failure to perform a duty which was imposed upon him because he was a telegraph operator."

The McKaig case was one where the operator had been directed by the dispatcher to put out the signal to stop a train. He was not performing any duty which pertained to his office as operator in giving information to the dispatcher to enable him in the performance of a master's duty. No case can be found except the Bentz case which holds, where the operator had been called upon *specially* by the dispatcher to give information to enable him to give orders for the movements of trains, that in that act, the operator was a fellow servant of the trainmen affected by what the dispatcher did. The court in the Bentz case holds that the decision in the Camp case sustains its opinion;

while the court in the Mix case, which was based on the Camp case, says, "that because it had held in the Frost case that a local operator in delivering orders from the dispatcher to the trainmen was a fellow servant with the trainmen, it by no means followed that in answering inquiries of the dispatcher, upon which he may or may not issue orders, the local operator is to be regarded as a fellow servant of the trainmen." In the Charless case the court said:

"There are decisions holding that a telegraph operator does not occupy the position of the train dispatcher merely because he transmits or delivers orders for the movement of trains, and that his negligence cannot be said to be the negligence of the company; but it is not necessary in this connection to determine the actual duty of a telegraph operator."

When we analyze the cases to which the court refers in the Bentz case to sustain its opinion, we find they do not in law sustain that opinion. The holding in the Bentz case is, because it can be made to appear that a local operator is a fellow servant of the trainmen under one state of facts, therefore he is under all circumstances.

VI.

The first question propounded is, whether an operator when called upon *specially* by the train dispatcher to enable him to give orders, is the operator a fellow servant of the trainmen? The second question, is the negligence of the operator in *observing* and reporting to the dispatcher the movements of trains past his station that causes an injury, that of a fellow servant or a vice principal? As applied to the facts of this case, it

may be conceded the operator was negligent in failing to observe and to report that 162 had passed his station. He was so negligent, because a rule of the company made it his duty to so report; but that such negligence caused the injury complained of is not in fact true, because we have shown if he had reported, there is nothing in the facts certified, that the dispatcher gives orders for the movements of trains on such reports. Furthermore, if it was the duty of the dispatcher to give orders *only* on such reports, then it was his negligence which caused the collision, because he gave orders without such report. As to the abstract proposition of law, whether the negligence of an operator in *observing* and *reporting* by telegraph the movement of trains past his station, which causes the death of a fireman of the company, is the negligence of a fellow servant of the fireman or a vice principal, the answer should be, that he is a vice principal. As we understand the question, the negligence, if any, consists in failing to observe and to report, as well in making an incorrect observation and a wrong report based on such observation, as if he had reported train No. 23 had passed his station, when he should have observed and reported train No. 25 had passed. In the illustration, the negligence would be in *observing* and *reporting*. We do not think the court under the certified facts intended we should discuss the question of law arising from the illustration, though to do so, is within the wording of the question. To answer the first question by holding that a telegraph operator, when called upon *specially* by the dispatcher to enable him to formulate orders for the movement of trains, the operator in giving such information is not a fellow

servant of train operatives, is to decide the case for the defendant in error. To hold the local operator under the circumstances stated in the first question was a fellow servant (strictly speaking) of the train operatives, decides the case in favor of the plaintiff in error; that is, provided the negligence of the operator was the proximate cause of the collision. What action this court will take as to the materiality of the second question, we do not know, and will discuss it. We have referred to the Shehan and Dana cases, wherein the court held, that the local operator in telling the conductor of train 50, "orders to hold 50 for 61," when his orders were to "hold 50 for orders," he was acting in the place of the master and a vice principal. The fact the company had adopted a rule requiring operators to report to the dispatcher the passage of trains past their stations and the direction in which extra trains are running, does not create the relation of fellow servantship between the trainmen and operator. What constitutes fellow servantship is a question of law under the facts of each case. Our contention is, if it is the duty of the company to give such orders for the running of trains for those operating them, and it is permitted the company to go behind the dispatcher, then the real question is, are the trains in any way subject to the will of the operator in regard to their movements. If they are, then in so far as the duty which the company owes to train operatives he is a vice principal. If two trains are set in motion running in opposite directions on the same track, the nature of the act requires a meeting place to be made for them to pass, and the trainmen timely notified of the place to avoid collision. This arises from the character of

the act, and it must follow that whoever is brought in connection with the making the meeting point, is necessarily performing a master's duty. The courts have held the dispatcher to be a vice principal.

M., K. & T. Ry. Co. vs. Elliott, 42 C. C. Apps., 188.

Lewis vs. Seifert, 116 Pa. St., 627.

B. & O. R. R. Co. vs. Camp, 13 C. C. Apps., 233.

Hankins vs. R. R. Co., 142 N. Y., 416.

Harrison vs. R. R. Co., 79 Mich., 407.

We have shown in Subdivision III of this argument, that the operator is consociated with the dispatcher in making the schedules, the duty of which belongs to the master. From the very nature of the transaction, if the trains are moved on a schedule created from any information, however furnished by the operator, then there is the better reason why the operator should be held to be a vice principal than the train dispatcher. It will be conceded if a dispatcher without any converse with the operator gives an incorrect order for the movement of trains that brings about a collision, the company would be responsible; then why is it not true, if a dispatcher gives an incorrect order based on a false report of the operator, the operator is not a vice principal, and the company liable. If the trains are caused to be moved by the dispatcher in the first instance, why are they not by the operator in the second. If this is true, then there is no reason why a distinction should be made between the dispatcher in one case and the operator in the

other. In the Baugh case the doctrine is laid down, that some other distinction than that of control must exist to destroy the relation of fellow servantship; and the test is, whether the act was one which from its character it was the duty of the master to perform. Such being the case, if the trains are moved on the inition of the dispatcher, and he is a vice principal, doing a master's duty, then it must be true, if the trains are moved on orders *created by report from the operator* to the dispatcher, and as to the trainmen, the operator stands to them in the same relation, where they are caused to be moved on his report, as the dispatcher sustains to them, when they are moved by *him* without any report from the operator. While the operator does not determine when they shall be moved, or pass each other, still the fact of their being moved is determined by him. The certified facts are, the dispatcher had sole power to give orders for the running of the trains; such being the case, he might or might not direct them to be moved on the report of the operator; therefore, for what reason can it be said, the failure of the operator to report the passage of trains by his station or his negligence in observing and reporting can be the proximate cause of injury from giving a false report? If it is his duty to observe and report the passage of trains past his station, and does not report (as was the case of the operator at Bonita) and afterwards the trains were moved by the dispatcher, after he had made *special* inquiry of the operator, as appears in this case, on what grounds can it be said, that the negligence of the operator at Bonita in failing to observe and report as required by the rule of the company, was the proximate cause of the collision

that caused the death of the intestate of defendant in error. The trains cannot be made to move by something the operator don't do (i. e., failure to report and observe), and they are moved afterwards (as they were in this case), it must have been by the dispatcher, or the operator when *specially* called upon to give information as to other trains, then in no sense was the operator a fellow servant of the trainmen in the transaction that caused the collision, or his fault the proximate cause of it. If the trains are moved from something the operator does, since it is the master's duty to make a schedule in accordance with which they are to be moved, then if in *any sense* the dispatcher can be said to be a *vice principal*, it must be the operator is one, and not a fellow servant of the trainmen in a transaction which causes a collision. If the operator is negligent in observing and reporting to the dispatcher the passage of trains past his station, as in the illustration heretofore stated, and from the wrong observation and report, the dispatcher gives an order that causes a collision, the operator's act in relation to the matter is that of a *vice principal*, because it was the master's duty to cause such orders to be given for the running of the trains to the persons engaged in operating them that would be reasonably safe. In this connection we call the court's attention to *Hall vs. Galveston & S. R. R. Co.*, 39 Fed. Rep., 18. A rule of the company made it the duty of the local operator to report defects in the road or bridges, or obstructions, to the nearest section or bridge foreman. In the discharge of this duty the court held the operator was a vice principal, and not a fellow servant of the trainmen. We have attempted to show that the holding in

the Camp and Frost cases are based on a different state of facts from the one at bar. That the court in the Mix case held the law applicable to these cases, is not so to the facts in this case. This court in *Price vs. R. R. Co.*, 145 U. S., 651, in which the facts were the same as in the Camp case, refused to hold that a local operator in delivering orders to the conductor on the arrival of the train was a fellow servant of the trainmen. The opinion of the lower court was affirmed without an opinion, the court being equally divided on the question.

Respectfully submitted,

A. M. ANTROBUS,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 211.—October Term, 1903.

Northern Pacific Railway Company *vs.* Alline A. Dixon, Administratrix of the Estate of Chauncey A. Dixon, deceased.	On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1904.]

This case is before us on questions certified by the Circuit Court of Appeals for the Eighth Circuit. The facts as stated are that Chauncey A. Dixon was employed on December 25, 1899, by the Northern Pacific Railway Company as a fireman in operating extra freight train No. 162, and while so engaged was killed by means of a head-end collision of that train with extra freight train No. 159. The company had made and promulgated time tables for its regular trains and had adopted reasonable rules for the operation of all its trains. The time tables did not and could not provide for the running of extra trains. The company had in its employ a train dispatcher at Missoula, Montana, who had general power and sole authority to make and promulgate orders for the running on the division of the road on which this collision occurred of those trains which were not governed by the time tables. A large proportion of it freight trains on this division were run as extra trains and the times of their arrival and departure were not shown on the regular time tables, but their movements were made upon telegraphic orders issued by the train dispatcher upon information furnished by telegraph to him by the station agents and operators along the line of the road. All these facts were known to Dixon. One of the rules of the company was: "Operators will promptly record in a book to be kept for the purpose and report to the superintendent the time of arrival and departure of all trains and the direction in which extra trains are moving." The reports mentioned in this rule were made to the train dispatcher and he was vested with the authority of the superintendent to issue orders for the movement of trains.

These two freight trains were running in opposite directions, train No. 162 going east. It arrived at Bonita at 12.35 A. M. and left there at 12.50 A. M. The local operator and station agent at that place was asleep and did not know of or report its arrival and passage to the dispatcher. None of the crew of that train were aware of the fact that train No. 159 was coming west. The railroad had but one track. At 1.05 A. M. No. 159 reached Garrison, about 48 miles east of Bonita, and

that was reported to the train dispatcher. Thereupon he asked the operator at Bonita, by telegraph, whether No. 162 had arrived there, and the operator promptly answered that it had not. This question was repeated, and the operator asked if he was sure that No. 162 had not passed Bonita, and he replied that he was sure that it had not. Thereupon the train dispatcher issued orders for the movement of these two trains, which were sufficient to guard against collision if the information received had been correct, but as it was not correct, the movement of the trains resulted in a collision and the death of Dixon, to recover damages for which this action was brought. Upon these facts the Circuit Court of Appeals certified the following questions:

"First. When a local telegraph operator is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, does the local operator in the matter of giving such information act as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given by the local operator?

"Second. Is the negligence of a local telegraph operator and station agent of a railway company in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which causes the injury or death of a fireman of the company without any fault or negligence of the train dispatcher, the negligence of a vice principal for which the railway company is liable in damages to the fireman or his personal representatives, or is it the negligence of a fellow servant of the fireman the risk of which the latter assumes?"

Mr. Justice BREWER delivered the opinion of the Court.

A servant is entitled to recover damages for injuries suffered through the personal fault or misconduct of his employer, but when the employer has been personally free from blame and the injury results from the fault or misconduct of a fellow servant it would seem reasonable that the wrongdoer should be alone responsible, and that one who is innocent should not be called upon to pay damages. And such is the general rule. But where the employer is a railroad or other corporation having a large number of employes, sometimes engaged in different departments of service, certain limitations or qualifications of this general rule have been prescribed. Perhaps no question has been more frequently considered by the courts than that of fellow servant, and none attended with more varied suggestions and attempted qualifications. It has been discussed so often that any extended discussion in the present case is unnecessary, and it is sufficient to state the principal suggestions and consider their applicability to the case at bar.

In a recent case in this court, *New England Railroad Company* v. *Conroy*, (175 U. S. 323,) it was said (p 328):

"We have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end."

Tested by this, it is obvious that the local operator was a fellow servant with the fireman. They were "engaged in the same general undertaking," the movement of trains. They were called upon "to perform duties tending to accomplish the same general purposes," and "the services of each in his particular sphere or department were directed to the accomplishment of the same general end." The fireman who shovels coal into the fire-box of the engine is not doing precisely the same work as the engineer, neither is the conductor who signals to the engineer to start or to stop, nor the operator who delivers from the telegraph office at the station to the engineer orders to move, and who reports the coming and the going of trains, and yet they are all working each in his particular sphere towards the accomplishment of this one result, the movement of trains.

Another qualification suggested is where the one guilty of the negligence has such general control and occupies such relation to the work that he in effect takes the place of the employer—becomes a vice principal, or *alter ego*, as he is sometimes called. If an employer, whether an individual or a corporation, giving no personal attention to the work, places it in the entire control of another, such person may be not improperly regarded as the principal and his negligence that of the principal. That thought has in some cases been carried further, and when it appeared that the work in which the employer was engaged was divided into separate and distinct departments, the one in charge of each of those departments has been regarded as also a vice principal. In *Baltimore & Ohio Railroad* v. *Baugh*, (149 U. S. 368, 383,) we said:

"It is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross case, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct."

So also in *Northern Pacific Railroad* v. *Peterson*, (162 U. S. 346,) it was held that the foreman of a gang of laborers employed in putting in ties and keeping in repair a part of the road, although he had the power to hire or discharge any laborer and exclusive control and management in all matters connected with their work, was a fellow servant with the men in the gang, and on page 355 the rule was thus stated:

"The rule is that in order to form an exception to the general law of non-liability the person whose neglect caused the injury must be 'one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department.' This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case."

Obviously there is nothing in this qualification which has application here. The negligent person was a local operator and station agent, and in no reasonable sense of the term a vice principal or in charge of any department.

Another suggestion is, that the doctrine of fellow servant does not apply where the servant injured and the servant guilty of the negligence are engaged in separate departments of service. In *Northern Pacific Railroad* v. *Hambly*, (154 U. S. 349,) a common laborer was employed under the direction of a section boss in building a culvert on the line of defendant's railroad, and while so employed was struck and injured by a moving passenger train, the injury resulting solely through the misconduct and negligence of the conductor and engineer of the train. It was held that they were fellow servants, and in respect to this suggestion it was said (p. 357):

"As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow service should not apply."

Applying this to the case before us, manifestly the work of the fireman and the operator brought the parties closely together in the matter of the movement of the trains. Dixon knew that any negligence on the part of the operator might result in injury to him, and must have contemplated such possibility when he entered the service of the company.

It is urged that "it is as much the duty of the company to give correct orders for the running of its trains so they would not collide as it was to see that their servants had reasonably safe tools and machinery with which to work, and a reasonably safe place in which to work," and hence, that one who is employed in securing the correct orders for the movement of

trains is doing the personal work of the employer, and not to be regarded as a fellow servant of those engaged in operating and running the trains. But the master does not guarantee the safety of place or of machinery. His obligation is only to use reasonable care and diligence to secure such safety. Here the company had adopted reasonable rules for the operation of all its trains. No imputation is made of a want of competency in either the train dispatcher or the telegraph operator. So far as appears, they were competent and proper persons for the work in which they were employed. A momentary act of negligence is charged against the telegraph operator. No reasonable amount of care and supervision which the master had taken beforehand would have guarded against such unexpected and temporary act of negligence. Before an employer should be held responsible in damages it should appear that in some way, by the exercise of reasonable care and prudence, he could have avoided the injury. He cannot be personally present everywhere and at all times, and in the nature of things cannot guard against every temporary act of negligence by one of his employes. As said in *Whittaker* v. *Bent*, (167 Mass. 588, 589,) by Mr. Justice Holmes, then a member of the Supreme Court of Massachusetts:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes. (*McCann* v. *Kennedy*, *ante*, 23.) See also *Johnson* v. *Boston Towboat Co.*, (135 Mass. 209;) *Moynihan* v. *Hills Co.*, (146 Mass. 586, 592, 593;) *Bjbjian* v. *Woonsocket Rubber Co.*, (164 Mass. 214, 219.)"

Without discussing more at length the various forms and phases of the question of fellow servants, or the many suggestions which have been made to qualify or limit the general doctrine, we answer the questions presented as follows:

First. The telegraph operator was, under the circumstances described, a fellow servant of the fireman.

Second. The negligence of the telegraph operator was the negligence of a fellow servant of the fireman, the risk of which the latter assumed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 211.—October Term, 1903.

Northern Pacific Railway Company *vs.* Alline A. Dixon, Administratrix of the Estate of Chauncey A. Dixon, deceased.	On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

[May 16, 1904.]

Mr. Justice White, with whom concurred the Chief Justice, Mr. Justice Harlan and Mr. Justice McKenna, dissenting.

As it is given to me to understand the ruling now made, it reverses many previous decisions of this court and introduces into the doctrine of fellow servant, as hitherto applied in those decisions, a contradiction which will render it impossible in the future to test the application of the rule of fellow servant by any consistent principle.

It is undoubtedly true that in many decisions of State courts of last resort the rigor of the rule of fellow servant has been assuaged by an extension of two conceptions, the one designated as "the department theory," and the other as the "doctrine of vice principal." By the application made of the first of these in the decisions referred to the relation of fellow servant would not exist in any case where the servants were working in separate departments, even although engaged in a single enterprise or common employment. By the second, where even a limited authority was possessed by a particular employe, such authority would cause him not to be a fellow servant with those over whom the authority was exercised.

But the decisions of this court, whilst not rejecting absolutely either the department or the vice principal theories, have with practical uniformity refused to adopt the broad import given to those theories as above stated. Accordingly it has been consistently held that the fact of separate departments did not destroy the relation of fellow servant unless the departments were substantially so distinct as to cause them to be independent one of the other to such an extent that the persons engaged in one or the other were not really employed in the same business. And so also as to the doctrine of vice principal, it has been uniformly held that it did not apply to every limited exercise of authority but was only applicable in cases where the person charged to be a vice principal possessed such general authority and supervision over the business as to cause him in effect to stand in the relation of master to those employed under him. But

whilst thus declining to fritter away the rule of fellow servant by a latitudinarian application of the department and vice principal theories, such theories have always been applied by the decisions of this court wherever a given case was embraced in the doctrine as expounded in the rulings of this court above referred to. Besides, it has been declared by an unbroken line of authority in this court that, wherever there rests upon the master a positive duty which the law has imposed upon him towards his servants, liability of the master for a failure to perform such positive legal duty could not be escaped by a resort to the principle of fellow servant because, in an action for damage occasioned by the neglect of the master to perform such positive duties, the doctrine of fellow servant had no application. I content myself with referring to some of the leading and more recent cases of this court establishing all the propositions which I have previously stated. (*Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Northern Pacific Ry. Co.* v. *Hambly*, 154 Ib. 349; *Central Railroad Co.* v. *Keegan*, 160 Ib. 259; *Northern Pacific Ry. Co.* v. *Peterson*, 162 Ib. 346; *New England R. R. Co.* v. *Conroy*, 175 Ib. 323.)

The inapplicability of the doctrine of fellow servant to a violation by the master of a positive duty resting on him, often stated in previous decisions, was reiterated in *Baltimore & Ohio Railroad Company* v. *Baugh*, *supra*, 387, and was fully restated in *Central Railroad Co.* v. *Keegan*, *supra*, where it was said (p. 263):

"We held in *Baltimore & Ohio Railroad Company* v. *Baugh*, (149 U. S. 368,) that an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow servants of the railroad company; hence that the fireman was precluded from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer. In that case it was declared that: '*Prima facie* all who enter the employment of a single master are engaged in a common service and are fellow servants. . . . All enter in the service of the same master to further his interests in the one enterprise.' And whilst we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employes under them, vice principals or representatives of the master as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice principal or representative of the master. It was further declared that 'the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment,' which the employe assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of

taking fair and reasonable precaution to surround his employes with fit and careful coworkers, and the furnishing to such employes of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employe turn rather on the character of the alleged negligent act than on the relations of the employes to each other, so that, if the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

And the Keegan case was cited approvingly in *Northern Pacific Railroad Co.* v. *Peterson, supra*, and *Railroad Co.* v. *Conroy, supra.*

With the rules thus conclusively determined by the prior decisions of this court, let me come to consider the questions certified in the light of the facts stated in the certificate. Now, it is undoubted from those facts that the accident was caused by an erroneous order issued by the train despatcher in charge of the movement of all the trains, and it is equally undoubted that the fatal error committed by the train despatcher was caused by the neglect of an operator on the line of the railroad with whom the train despatcher communicated before he gave the erroneous order. To determine whether the doctrine of fellow servant applies to such a case it must be ascertained first, whether the train despatcher was a fellow servant with those operating the train; and, second, if he was not, can the corporation avoid liability because the error of the train despatcher was occasioned by the wrong of an operator.

First. Whether it be considered in the light of the doctrine of vice principal as applied in the decisions of this court, or from the point of view of the positive duties of the master, it seems to me that the train despatcher was not the fellow servant of the men running the trains. The despatcher was a vice principal in the narrowest significance of that term. He represented the master as to the operation and movement of trains over the road. He formulated and transmitted the orders by which all were to be governed. The duty to obey his orders rested on those in charge of every train, and upon complying with this duty of obedience on their part their safety, as well as the safety of persons employed on or moved by every train, depended. As the duties of the train despatcher were of the character just stated, it must besides follow, in any view, it seems to me, that in performing them he was discharging a positive duty imposed by law upon the master. For it cannot, in reason, I submit, be questioned that the law placed a positive duty on the master to furnish a safe place to work and to give such orders as would save those who obeyed them from loss of life or limb. The opinions of this court in the cases already referred to leave no room for question on this latter proposition, and there are other

decisions not previously referred to which treat it as elementary. (*Hough* v. *Railroad Co.*, 100 U. S. 213; *Northern Pacific Railroad Co.* v. *Snyder*, 152 Ib. 684; *Northern Pacific R. Co.* v. *Hambly*, 154 Ib. 349; *Northern Pacific R. Co.* v. *Peterson*, 162 Ib. 346, 353.)

The doctrine of positive duty was applied to the determination of whether a train despatcher was a vice principal and performed the master's duty, by the Court of Appeals of the State of New York, in *Hankins* v. *New York, Lake Erie & Western Ry. Co.*, (142 N. Y. 416,) and was also applied to the case of a train despatcher by the Supreme Court of Pennsylvania in *Lewis* v. *Seifirt*, (116 Penn. St. 629.) Indeed, elaboration to show that a train despatcher is either a vice principal or one who in the discharge of his functions performs a positive duty of the master, is unnecessary, since the opinion of the court in this case proceeds upon the assumption that such is the case, and rests its conclusion upon the theory that the rule of fellow servant applies because the error of the train despatcher was caused by the fault of the operator. This then is the real issue.

Second. It being then established that the train despatcher was either a vice principal or performing the positive duty of the master, does the fact that his wrongful order for the movement of the train was occasioned by the neglect of the operator with whom he communicated give rise to the application of the rule of fellow servant? I fail to perceive how it can, if the principles which the previous decisions of this court have upheld are to be adhered to. Those principles are these: That where the act is one done in the discharge of a positive duty of the master, negligence in the performance of the act, however occasioned, is the act of the master, and not the act of a fellow servant. To say to the contrary, it seems to me, to cause the decisions of this court to reduce themselves to two contradictory proposition; first, that a servant when injured by the act of another person cannot be allowed to recover, by applying the broad construction given by many of the State courts to the vice principal and department theories, because the correct rule is the one which narrows those theories, and because, besides, the truer test by which to ascertain the existence of the relation of fellow servant is to determine whether the act done was one concerning a positive duty of the master; and, second, when a case is presented where the act complained of has been done by a vice principal, under the view adopted by this court of that theory, or involves a positive duty of the master, there may be no recovery because of the application of the doctrine of fellow servant to the case. The result being that recovery cannot be had in any event.

The decisions of this court leave no doubt as to the true rule on the subject. In *Northern Pacific Railway Co.* v. *Herbert*, (116 U. S. 642,) speaking of the positive duty of the master, the court, through Mr. Justice Field, said, (p. 647):

"This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him."

In *Northern Pacific Railway Company* v. *Hambly*, (154 U. S. 359,) the court, speaking through Mr. Justice Brown, thus approvingly referred to the Herbert case (p. 359):

"The case of *Northern Pacific R. R. Co.* v. *Herbert*, (116 U. S. 642,) is an illustration of this principle. The plaintiff in this case was a brakeman in defendant's yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. He received an injury from a defective brake, which had been allowed to get out of repair through the negligence of an officer or agent of the company, who was charged with the duty of keeping the cars in order. It was held, upon great unanimity of authority, both in this country and in England, that the person receiving and the person causing the injury did not occupy the relative position of fellow servants. See also *Hough* v. *Texas & Pacific R. R. Co.*, (100 U. S. 213;) *Union Pacific R. R. Co.* v. *Snyder*, *ante*, 597.)"

In *Union Pacific R. R. Co.* v. *Snyder*, (152 U. S. 684.) an action for injury occasioned by the breaking of a defective car wheel, the existence of which defect had not been discovered owing to insufficient inspection, liability was sought to be escaped upon the plea that a sufficient number of competent inspectors had been employed. But, declaring the liability of the railroad company, the court said (p. 689):

"There can be no doubt that under the circumstances of the case at bar the duty rested upon the company to see to it, at this inspecting station, that the wheels of the cars in this freight train, which was about to be drawn out upon the road, were in safe and proper condition, and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform that duty or through its negligent performance."

Again, in *Northern Pacific R. R. Co.* v. *Peterson*, (162 U. S. 346.) speaking through Mr. Justice Peckham, of the positive duties of the master, the court said (p. 353):

"He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further

duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If the master be neglectful in any of these matters, it is a neglect of a duty which he personally owes to his employe, and if the employe suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such."

And these principles have been applied by the Court of Appeals of the State of New York to a case like the one at bar. (*Dana* v. *Railroad Co.*, 92 N. Y. 639.) In that case, in communicating verbally to a conductor an order received from the train despatcher, an error was committed by one Keifer, a telegraph operator, and a collision between trains resulted. In the course of the opinion, reversing the judgment which had been entered in favor of the railroad company, the court said (p. 942):

"For Keifer's act, in this respect, the defendant is clearly liable. The act he was required to do, and did perform, was one for which the master was responsible as a duty pertaining to itself, and as to it Keifer occupied the place of master. (*Flike* v. *Boston & Albany R. R. Co.*, 53 N. Y. 549; 13 Am. Rep. 545.)"

Nor do I perceive the pertinency, as applied to the facts in the case at bar, of the extract made from the opinion of the Supreme Judicial Court of Massachusetts in the case of *Whittaker* v. *Bent*, (169 Mass. 588, 589.) The doctrine of transitory risk as expounded in the case referred to and in previous cases in Massachusetts which that case followed really amounts only to this, that where the work is of such a character that dangers which cannot be foreseen or guarded against by the master, may in the nature of things suddenly and unexpectedly arise, there is no neglect of a positive duty owing by the master in failing by himself or the agencies he employs to anticipate and protect against that which the utmost care on his part could not have prevented. But this doctrine can have no application to a case like the one in hand, where the damage was occasioned by an act of obvious neglect in the performance of a positive duty.

That the doctrine of transitory risk applied in the Massachusetts cases relied upon has no application here, it seems to me is made clear by the fact that it is stated in the certificate that the trains in question were extra trains, obliged by the rules of the company to run on no preordained schedule, and solely under the command of the despatcher, and that, to quote the certificate, "a large proportion of its freight trains on this division were run as extra trains, and the times of their arrivals and departures were not shown on the regular time tables, but their movements were made upon telegraphic orders issued by the train despatcher upon information

furnished by telegraph to the train despatcher by its station agents and operators along the line of the railroad." To apply the transitory risk theory to this condition of affairs it seems to me is to say that the method permanently adopted by the company for running the class of trains in question is to be governed, not by that fact, but by the fictitious assumption that the trains were temporarily operated by wire alone. The consequence of the application of the doctrine of transitory risk to the condition of affairs shown in the certificate is, as I understand it, but to say that a railroad which chooses to operate its trains solely through orders of the train despatcher is a licensed wrongdoer as respects its employes, since thereby it is exempt from those rules of positive duty which the law would otherwise impose. The result is, besides, to decide that if a railroad adopts a regular schedule the law casts a positive duty on it as regards its employes, but that it may escape all such duty on the theory of transitory risk, if only the road elects to adopt no schedule and to operate its trains solely by telegraph.

For the foregoing reasons I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice HARLAN and Mr. Justice MCKENNA concur in this dissent.